IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OREGON,	)	
	)	
Plaintiff,	)	Case No. 17CR34550
	)	
v.	)	ORDER DENYING MOTION FOR ORDER
	)	CHANGING PLACE OF TRIAL TO ANOTHER
JEREMY JOSEPH CHRISTIAN,	)	COUNTY
	)	[Order #44]
Defendant.	)	

This case came before me for hearing on defendant's Motion for Order Changing Place of Trial to Another County. Mr. Gregory Scholl and Mr. Dean Smith appeared on behalf of Mr. Christian. Mr. Jeffrey Howes and Mr. Don Rees appeared on behalf of the State.

ORS 131.355 provides:

> "The court, upon motion of the defendant, shall order the place of trial to be changed to another county if the court is satisfied that there exists in the county where the action is commenced so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial."

ORS 131.363 provides:

> "For the convenience of parties and witnesses, and in the interest of justice, the court, upon motion of the defendant, may order the place of trial to be changed to another county."

The court does not read ORS 131.363 to apply to this case. When construing a statute, a court must first look to the text and context of a statute and may look to legislative history to the extent it is helpful to the court's determination. *State v. Gaines,* 346 Or 160, 171-172 (2009). The pertinent context includes

other provisions of the same statute and other related statutes, as well as the preexisting common law and the statutory framework within which the statute was enacted. *Bell v. Tri-Met,* 353 Or 535, 540 (2013). In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all. ORS 174.010.

The text of ORS 131.363 permits a court to order a change of venue "For the convenience of parties and witnesses, *and* in the interest of justice..." (Emphasis added). To disregard the convenience of the parties and witnesses as playing a role in this permissive change of venue would be to omit language specifically included in the statute. The word "and" requires the court to consider the two phrases as linked together. It does not permit the court to find one condition and not the other. Neither party is arguing here that moving the trial to another county would be convenient for the parties and witnesses. The court does not find ORS 131.363 confers authority to change venue based on the judge's consideration of various and sundry factors not enumerated in the statute.

ORS 131.355, on the other hand, requires change of venue if the court finds the circumstances listed in the statute are present. It has as its underpinning the right to trial by a fair and impartial jury under Article I, Section 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments of the United States Constitution. Oregon cases have assumed that the analysis for the statutory and constitutional provisions is the same. *State v. Sparks,* 336 Or 298, 309 (2004); and *State v. Fanus,* 336 Or 63, 77 (2003); *State v. Langley,* 314 Or 247, 259 (1992). Additionally, in construing the meaning and application of Oregon's statute and state constitution in this context, a court considers and gives due weight to federal court interpretations of federal law on the same subject based on the pertinence and persuasiveness of the reasoning offered. *State v. Sparks,* 336 Or at 309.

The defense argues that defendant need not prove that prejudicial pre-trial news has actually precluded the possibility of a fair trial but that there need only be a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial. That is the standard articulated in *State v. Herrera,* 32 Or App 397, 402 (1978), rev'd on other grounds, 286 Or 349 (1979). *Herrera* does not cite any authority for that holding. The defense also cites *State v. Stiltner,* 80 Wash 2d 47, 54-55, 491 P2dd 1043 (1973), which provides that where the circumstances involve a probability that prejudice will result due to pre-trial publicity, it is to be deemed inherently lacking in due process. (Citing *Sheppard v. Maxwell*, 384 US 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); and *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).

This holding recognizes that a defendant seeking to show prejudice so as to justify change of venue may show either actual prejudice or presumed prejudice. *Murray v. Schriro,* 882 F3d 778, 802 (9th Cir. 2018), citing *Skilling v. United States,* 561 US 358, 130 S.Ct. 2896, 2907 (2010). A defendant may establish the existence of actual prejudice if, during voir dire, potential jurors who have been exposed to pretrial publicity express bias or hostility toward the defendant that cannot be cast aside. *Murray v. Schriro,* 882 F3d at 802-803, citing *Skilling,* 130 S Ct at 2918 and n. 20.

To secure a change of venue short of calling potential jurors to testify, the defendant here must reply on presumed prejudice. While it need not be actual, the standard remains high. The Court in *Skilling* discussed the scenarios that led to the findings in *Sheppard, Estes* and *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). In each of those cases, the Court overturned convictions "obtained in a trial atmosphere that [was] utterly corrupted by press coverage." *Skilling,* 130 S Ct at 2914. The Court reviewed the details that supported the conclusion that press coverage corrupted the opportunity for a fair trial and concluded "A presumption of prejudice, our decisions indicate, attends only the extreme case." *Skilling,* 130 S Ct at 2915.

The Oregon Supreme Court recognizes the presumed prejudice standard, but in doing so, rejects that it can be found when there is a "reasonable likelihood" that defendant cannot obtain a fair and impartial trial. Rather, under the statute, a court must be satisfied there exists "so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial." *State v. Sparks,* 336 Or at 305. In explaining what would meet that standard, the Oregon Court relied on the standard articulated in *Irvin v. Dowd,* 366 US 717, 81 S Ct 1639 (1961), that the record of publicity in the case should "disclose a sentiment of deep and bitter prejudice against the defendant. *Sparks,* 336 Or at 306, citing *State v. Fanus,* 336 Or 63, 80 (2003).

It is the burden of the movant to establish the basis for changing venue. *Irvin v. Dowd,* 366 US at 723. In exercising its discretion to determine whether prejudice against a defendant necessitates a change of venue, a trial court must evaluate the likelihood of such prejudice from both the character and the extent of any pretrial publicity about the case; from the degree of any difficulty in obtaining impartial jurors; and from any other factor that might be indicative of prejudice against the defendant. *State v. Fanus,* 336 Or at 78-79. The test is "whether the nature and strength of the opinion formed are such as in law necessarily ...raise the presumption of partiality." *Irvin v. Dowd,* 366 US at 723, citing *Reynolds v. United States,* 98 US 145, 156 (1878). In determining whether a trial court abused its discretion in denying a motion for change of venue, a reviewing court considers any unusual difficulty in obtaining a fair and impartial jury. *Id* at 79.

Determining whether a jury pool may be irretrievably tainted by pre-trial publicity is no easy task. As the State in this case suggests, the court could wait until jury selection begins, at which time the level of community prejudice could be more readily ascertained. The court also notes that even when jurors indicate they can be fair despite exposure to adverse pre-trial publicity, that position may belie a "stealth" prejudice. As stated in *Irvin v. Dowd,* "Impartiality is not a technical conception. It is a state of mind." *Irvin v. Dowd,* 366 US at 724, quoting Chief Justice Hughes, in *United States v. Wood,* 299 US 123, 145-146 (1936).

The *Irvin* case set the foundation for what would later become the presumed prejudice standard. *See, Estes v. Texas,* 381 US at 543 (describing then Court's careful examination of the facts in order to determine whether prejudice resulted.) The Court held that jurors need not be unaffected by pre-trial publicity. In an age of "swift, widespread and diverse methods of communication.... to hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is

sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd,* 366 US at 722-723. There is no particular test, procedure or formula prescribed by the Constitution in determining whether a juror can lay aside an impression or opinion and instead possess a "mental attitude of appropriate indifference." *Id,* at 724.

As other courts have done, the court reviews prior cases in which a reviewing court held it was an abuse of discretion to deny venue change. In *Irvin,* there are some notable similarities to the pre-trial publicity described in this case, but also some notable differences. The defendant there was charged with six different murders over the course of several months, both in Kentucky and Indiana. Trial was to be in a county with a population of 30,000. It was reported that he had failed a lie detector test and that the murders were solved but he "refused" to confess. Later, the fact of his confession to the murders was reported as was his offer to plea guilty to receive a sentence of 99 years in prison. It was further reported that at least one law enforcement officer sought to "devote his life" to securing the defendant's execution and that defendant was remorseless and without conscious. *Irvin v. Dowd,* 366 US at 725-726.

A couple of years later in *Rideau v. Louisiana,* the Supreme Court held it was an abuse of discretion to deny a motion to change venue when the law enforcement officers filmed the defendant's confession to killing a bank employee during a bank robbery in Lake Charles, Louisiana and aired it repeatedly. The people of Calcasieu Parish had been exposed "repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged. For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Rideau v. Louisiana,* 373 US at 725-726.

In *Estes v. Texas,* the Court explored the role of a highly publicized pre-trial hearing and wrote, "[I]t may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence." 381 US at 536. The publicity at issue consisted of the initial proceedings of a trial that had gained national attention. It was conceded that the media's presence in the courtroom (including 12 camera operators, broadcasting the proceedings live, setting up extra microphones aimed at the parties and jury box) was disruptive to the proceedings. Not only were members of the venire present for this display, they were portrayed during the live broadcast and again on the evening news. The clips from that day were rebroadcast repeatedly prior to the trial. Four of the jurors ultimately chosen for trial had seen previous airings of the proceedings. *Estes,* 381 US at 536-538.

In *Sheppard v. Maxwell,* 384 U.S. 333 (1966), the judge's instructions to the jury merely "suggested," "requested," and "cautioned" jurors not to review press accounts rather than directing jurors to ignore news stories. The press also published numerous pictures of the jurors, with their addresses, which appeared in the newspapers before and during the trial itself, and prospective jurors had received

anonymous letters. The fact that anonymous letters had been received by prospective jurors should have made the judge aware that this publicity seriously threatened the jurors' privacy. *Sheppard,* 384 US at 353. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people. Furthermore, the trial began two weeks before a hotly contested election at which both the chief prosecutor Mahon and the judge were judicial candidates. 384 US at 355.

In *Fanus, supra,* the defendant was charged by the Douglas County District Attorney with Aggravated Murder and Attempted Aggravated Murder among other charges for breaking into the home of Marine Corps Major General Marion Carl and killing him and shooting his wife, Edna Carl. The defendant presented significant evidence regarding pre-trial publicity, including 41 articles and editorials from the Douglas County paper, testimony from a local television news director about the scope of coverage, surveys of Douglas County and Multnomah County voters conducted two months after the killing, and an expert witness who opined that, based upon his analysis of the pretrial publicity and survey results, at least a reasonable likelihood existed that defendant could not obtain a fair trial in Douglas County. The expert testified that several factors created heightened prejudice against defendant in that venue, including the county's population size[1] and Marion Carl's stature in that community. Some of the newspaper articles reported facts about defendant's criminal history. One article described Marion Carl's murder as the top local news story in 1998. *Fanus,* 336 Or at 74-75. The defendant in *Sparks* also presented a poll of Yamhill County voters fairly close in time to the murder along with a few newspaper articles that detailed accusations that defendant raped and murdered a 12-year-old girl.[2]

The trial court in *Fanus* denied defendant's motion to change venue, concluding that defendant had failed to show that he could not obtain a fair and impartial jury in Douglas County. The court agreed that the case had generated extensive publicity, particularly in that venue. The court also agreed that some of that publicity had been "problematic," and the court speculated that "the nature of [the] status of the victim and the tremendous amount of publicity about that could well result in dislike or unfavorable prejudice toward the accused." The court, however, was not persuaded that defendant could not obtain a fair trial in Douglas County, because it also found that most of the publicity had occurred more than six months earlier, that defendant's survey was flawed, and that fewer potential jurors were likely to remember facts about the case than defendant's survey suggested. *State v. Fanus,* 336 Or at 75-76.

In *Sparks,* of the 13 jurors that actually served, six disclosed that they either had seen some form of pretrial publicity about the case or had talked to a friend or family member who had seen publicity about the case. However, none of those jurors could remember details about that publicity and each stated that he or she could decide the case based solely on the evidence presented at trial. The Court of Appeals concluded that the trial court did not abuse its discretion in denying defendant's motion for change of venue. *State v. Sparks,* 336 Or at 306.

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[1] The U.S. Census Bureau lists the population of Douglas County in 2000 as 100,399. The Bureau estimates the 2017 population of Multnomah County as 807,555.

[2] The U.S. Census Bureau lists the 2000 population of Yamhill County as 84,992.

Defendant here does not present any polls or expert testimony as were presented in *Fanus* and *Sparks*, but does include an exhibit with about 150 pages including veritable reams of articles from local print and online news outlets. As in the *Fanus* case in 1998, the three victims in this case – Rick Best, Taliesin Myrddin Namkai-Meche, who were killed, and Micah Fletcher, who survived the attack – were honored with the headline "Three MAX heroes are The Oregonian's/Oregon Live's 2017 Newsmakers of the Year." The cumulation of evidence tends to indicate a "market saturation," in which the community at large is quite aware of the nature of the story and to a varying degree the details of the story.

> [The court makes specific findings in an addendum to this order regarding press reports that are pertinent to the court's decision. Like the exhibits submitted in support of the defense motion, the findings are submitted under seal to avoid additional airing of prejudicial press material. This is the place in this order where those findings would be contained if not under seal.]

The court agrees with the sentiment expressed by the trial judge in *Fanus* that "the nature of [the] status of the victim[s] and the tremendous amount of publicity about that could well result in dislike or unfavorable prejudice toward the accused."

There are notable distinctions in this case and within the defendant's exhibit that is not present in the historical cases reviewed by the court. First, news in this generation is not presented solely in print or broadcast, but is available online at any given time. This allows readers and viewers who may not catch the initial story to be able to review it hours and days after it has initially been a top headline. Such stories remain available on an extended basis through a simple online search. The stories may also appear as "pop-ups" or suggested items if they are similar to other stories accessed by the online user. This availability on an ongoing basis would mean significantly more readers and viewers become familiar with the information than would be in the past in which the access would be solely via print edition or broadcast episode. To what degree the information is magnified in this manner is entirely unknown.

Second, the online presence of the stories enables readers and viewers to be able to add their own personal comments. As detailed in the exhibit provided by the defendant, the online comments in this case are virulent and many evince a pre-determined prejudice such that if any of these commenters were to be selected as a juror, it would likely deprive Mr. Christian of a fair and impartial jury. To the extent the comments can be considered a "poll," the percentage of individual commenters (as opposed to comments) in relation to the number of eligible jurors is unknown. Nor would anonymous commenters constitute a reliable cross-section of the population from which a court could find press coverage had corrupted the atmosphere in a community so thoroughly as to deny the defendant the opportunity to select fair and impartial jurors following a carefully-conducted jury selection process.

Third, the killings in this case took place in a Max light rail car on the main line in the heart of the city at rush hour. The light rail system is the hub of the public transportation infrastructure in Multnomah County. Anyone who has ever ridden a Max train and who knows of the story has, to one degree or another, a personal connection with the attack. On the one-year anniversary of the killings there was erected a permanent memorial at the 42nd Street station to honor the victims in the case. Anyone who

uses that station is reminded every time of the attack. Any juror who lives close to or east of the Hollywood station and uses the light rail to get downtown would presumably view or pass the landmark on the way to trial every day of the case.

While defendant has succeeded in establishing extensive, adverse publicity in relation to this case, that fact alone will not require a change of venue. The elements that undermined the defendants in *Irvin, Rideau, Estes,* and *Sheppard* are not present here. [The court makes additional findings regarding these elements in its Addendum, filed under seal.] The circumstances do not rise to the extreme level so as to presume prejudice, as is stated in *Skilling v. United States,* 130 S Ct at 2915.

The court agrees with defendant that the fact that this case carries the death penalty is a factor in determining the necessity of a change of venue. At this juncture, however, that fact does not tip this case into a posture requiring change of venue based on presumed prejudice.

It will be imperative to carefully conduct the voir dire process here. Even then, there is no automatic formula that will trigger a venue change. It was sufficient in *Fanus* that, although 10 of the 12 jurors who served stated familiarity with the case during voir dire, none of the jurors had followed the publicity with much interest and all the jurors (presumably reliably) stated they could decide the case based solely on the evidence presented at trial. *State v. Fanus,* 336 Or at 80. Similarly, it was sufficient in *Sparks* when six of 13 jurors who served disclosed that they either had seen some form of pretrial publicity about the case or had talked to a friend or family member who had seen publicity about the case, but none of those jurors could remember details about that publicity and each stated that he or she could decide the case based solely on the evidence presented at trial. *State v. Sparks,* 336 Or 306. Excusing 20 of 78 members of the venire for cause due to their opinion regarding defendant's guilt was not enough to conclude that pre-trial publicity had actually prejudiced the defendant. *Murphy v. Florida*, 421 US 794, 803 (1975). On the other hand, when 90 percent of jurors examined were inclined to believe in the accused's guilt, and the court had excused for cause 268 or 430 potential jurors, the reliability of jurors who indicate they can be fair is more likely to be brought into question. *Id,* citing *Irvin v. Dowd, supra.*

There is no hard-and-fast formula that dictates the necessary depth or breadth of *voir dire*. *Skilling v. United States,* 130 S Ct at 2917. When pretrial publicity is at issue, primary reliance on the judgment of the trial court makes good sense because the judge sits in the locale where the publicity is said to have had its effect and may base her evaluation on her own perception of the depth and extent of news stories that might influence a juror. *Id* at 2917-2918, *citing Mu'Min v. Virginia,* 500 U.S. 415, 427, 111 S.Ct. 1899 (1991). The trial judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty. *Skilling v. U.S.* 130 S Ct at 2918. The case goes on to then describe protections the trial court may utilize in conducting voir dire so as to support empaneling an impartial jury.

The court agrees with the State's approach to begin voir dire in this case and then determine based on that process whether there exists "so great a prejudice that the defendant cannot obtain a fair and impartial trial." The court gives leave to defendant to re-raise this motion at that time.

IT IS SO ORDRED this 8th day of April, 2019.

Judge Cheryl Albrecht